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October 18, 1996

Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Re: In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996
CC Docket No. 96-128

Dear Secretary:

Enclosed find an original and 14 copies of the Petition For Reconsideration of the Wisconsin Pay Telephone Association, Inc., regarding the above-captioned matter.

Thank you in advance for your consideration of this Petition.

Yours very truly,

ANDREW J. PHILLIPS

AJP:als

Enclosures

cc: Common Carrier Bureau
Terrence S. Fox

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128

PETITION FOR RECONSIDERATION OF THE WISCONSIN PAY TELEPHONE ASSOCIATION, INC.

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October 18, 1996

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SUMMARY

The independent payphone service providers have been waiting for what seems to be eternity for the Commission to undertake a fair compensation proceeding. Ultimately, it took a mandate by Congress to light the fire and get this matter on the front burner. Many independent payphone service providers saw the Telecommunications Act of 1996 as a final means to an end for them to receive fair compensation for all calls and to eliminate the discriminatory practices and payphone subsidies that were pervasive in the industry.

Regarding compensation, the Commission is required to establish fair compensation for all interstate and intrastate calls and not merely at a level which provides table scraps. The statute is clear in that it requires the Commission to set actual fair compensation levels and not leave the determination of fair compensation to the relevant parties, since that would lead to inconsistent and unfair results. Therefore, the Commission's mandate is to prescribe a uniform compensation rate on a per-call basis in an amount which fairly compensates the payphone service providers.

It is clear that the concept of "fair compensation" encompasses not only all costs of doing business but profit, as well. In a true arm's length transaction, a willing seller of services will not enter into a transaction with a perspective buyer unless profit can be made. The Commission's failure to recognize the realities of true arm's length transactions (in setting the per-call rate at $.35 per call) is fatal to its ultimate determination. The amount of compensation which the Commission must prescribe for all calls should be in the neighborhood of $1.50 per call to ensure that the payphone service providers are fairly compensated. This amount is consistent with the compensation requirements for "takings" under Article V of the Amendments to the Constitution of the United States and cases interpreting same. This is supported by the history

of dial-around calls, which took substantial revenues away from the independent payphone providers.

Alternatively, the Commission should, at a minimum, prescribe compensation at the rate of $.90 per call. This amount is consistent with current Commission rates paid by AT & T for 0+ calls which is the most accurate barometer of market conditions. Anything less is a boon to the carriers and a continued loss for the payphone services providers.

Additional flaws in the Commission's Report and Order, include a determination that flat-rate compensation would be paid for the first year since call tracking is not widely available. Rather, the Commission should have ordered that all carriers that are capable of tracking compensation on a per-call basis or contracting out for the service must do so immediately since those carriers make up the highest volume of calls. The remaining carriers who are unable to track calls on a per-call basis must be ordered to pay compensation at a flat-rate monthly amount per phone until they are either able to track calls or contract out for the service.

The Commission, in its Report and Order, should require that carriers pay the compensation within 30 days of each period. They are certainly capable of doing this and no logical reason exists to order otherwise.

The Commission's Report and Order is also flawed in that it fails to eliminate the end-user common line charge (characterized as a subscriber line charge) despite the strong mandate of the statute which requires the discontinuation of "the intrastate and interstate carrier access charge payphone service elements...". The Report and Order does not adequately address this issue, since it merely requires the charge to also be paid by LEC non-regulated payphones.

Before the
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PETITION FOR RECONSIDERATION OF THE
WISCONSIN PAY TELEPHONE ASSOCIATION, INC.

I. INTRODUCTION AND BACKGROUND

The Wisconsin Pay Telephone Association, Inc., ("WPTA") hereby submits this Petition for Reconsideration of the Commission's Report and Order, FCC 96-388, released September 20, 1996, to implement §276 of the Communications Act of 1934, 47 USC §276, as added by §151 (a) of the Telecommunications Act of 1996, Pub. L. 104-104 (Feb. 8, 1996).

Prior to discussing the particular issues with which the WPTA is concerned, it is important for the Commission to understand why the WPTA is jumping into the mix at this time and not during the initial commenting stage. The WPTA is an infant association representing the interests of members who collectively possess the highest number of privately owned pay telephones in the State of Wisconsin.

The WPTA has only been incorporated since January 30, 1996. Thereafter, its membership grew to a point in which it could begin receiving dues for purposes of operating

expenses. The WPTA had not been able to raise sufficient funds in order to hire counsel until the end of July of this year. As a matter of fact, my services as general counsel to the WPTA began on July 25, 1996. Therefore, by the time the WPTA had resources and legal counsel, it was not yet in a position to file comments in relation to the Notice of Proposed Rule Making, FCC 96-254, released June 6, 1996. Therefore, it is important for their voices to be heard with respect to this particular docket, both for the Commission's edification and other evident legal purposes.

When the Telecommunications Act of 1996 passed, members of the WPTA were ecstatic that finally they could see light at the end of the "fairness" tunnel. On both the state and federal level, WPTA members have been fighting and praying for fair compensation for each and every individual call originated by their pay telephones, the elimination/discontinuation of all carrier access charges (including end-user common line charges) and the end of all payphone subsidies and discrimination by the local exchange carriers ("LECs").

In February of this year, many independent payphone providers reveled in the mandate handed down by the Telecommunications Act of 1996 directing the Commission to, in essence, take action on issues which should have been considered and ruled upon many years ago. In this sense, many of the initial comments made by the American Public Communications Counsel ("APCC") as set forth on Pages 1-3 of its initial comments dated July 1, 1996, ring true.[1] The

[1] Based upon the existing record before the Commission, the APCC has initiated numerous actions with the Commission on many of the issues pertinent to the Telecommunications Act of 1996, including end-user common line charges and compensation for subscriber 800 calls. It is evident that the introductory comments of the APCC reflect the wide spread frustration in the industry that the demands and requests of the independent pay telephone providers have fallen on deaf ears at the Commission level. This is especially evident when the Commission took no meaningful action after the 1995 Court of Appeals decision in Florida Public Telecommunications Association v. FCC, 54 F. 3d 857 (D.C. Cir. 1995).

wait has been long for the independent pay telephone industry and the mandate handed down by the Telecommunications Act of 1996 appears to be clear.

The jovial attitudes of the individual WPTA members abruptly changed upon receiving and reviewing the Report and Order in this matter. Although the Report and Order was viewed as a good beginning, it fell short of expectations in a number of important areas. The initial, short list of complaints with regard to the report and order are as follows:

A. The $.35 per-call level of compensation cannot be deemed "fair" as required by §276 (b)(1)(A) of the Act; nor can that level be considered "just" as required under Article V of the Amendments to the Constitution of the United States.

B. That the flat rate of $45.85 for each pay telephone per month is not consistent with statutory mandate requiring the Commission to establish a "per-call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed interstate and intrastate call using their payphone..." pursuant to §276 (b)(1)(A) of the Act.

C. That the Commission failed to require the payment of compensation within 30 days of the end of a period.

D. That the Commission ordered the end-user common line charge/subscriber line charge to be treated in a non-discriminatory manner so that the LECs must discontinue it as a subsidy to their now unregulated payphone divisions rather than discontinuing this access charge to all payphones as mandated under §276 (b)(1)(B) of the Act.

In short, the WPTA believes that the Commission has not acted within the clear mandates set forth under §276 of the Telecommunications Act of 1996 regarding the issues. Although the scope of this Petition is limited to the issues above, the WPTA realizes that there are additional issues of importance for which reconsideration and/or appeal should be taken. However, it is

anticipated that other parties and interested persons will be filing petitions for reconsideration on those issues, including the APCC.

II. COMPENSATION ISSUES

In clear language, Congress, in passing §276 (b)(1)(A) of the Telecommunications Act of 1996, has ordered the Commission to set forth regulations that:

> establish a **per call** compensation plan to **ensure** that all payphone service providers are **fairly compensated** for **each** and **every** completed intrastate and interstate call using their payphone[.] (Emphasis added.)

Although the above Congressional mandate appears clear, Congress additionally specified as its purpose that it wanted "to promote competition among payphone service providers and promote the wide spread deployment of payphone services to the benefit of the general public..." 47 U.S.C. §276 (b)(1). Taken together, it is obvious that Congress believed that the best way to promote wide spread deployment of payphone services and to promote competition in the industry was, in part, to make certain that all of the payphone service providers received fair compensation. It is no secret that a direct relationship exists between higher levels of compensation and increased deployment in pay telephones. In other words, if a payphone service provider cannot make enough money to put up a payphone at a particular street corner, mom and pop store, gas station, convenience store, etc., the telephone will not be installed.

A. The Commission Failed To Follow The Congressional Mandate To Prescribe Regulations Ensuring Fair Compensation To PayPhone Service Providers For Each And Every Completed Call.

The essential premise behind the Commission's Findings and Conclusion in this particular area of the Report and Order is that the "most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones." Report and Order, ¶49. To further its premise, the Report and Order uses free-

market definitions of "fair compensation" by stating that it occurs "where there is a willing seller and a willing buyer at a price agreeable to both." Id., ¶52. Unfortunately, these free-market concepts are not suitable for an industry such as the payphone industry which is heavily and pervasively regulated. The regulations that exist have a tendency to handicap one of the parties and empower the other.

In a true free-market arena, the payment of "fair compensation" for goods and services will allow negotiations where each party has relatively equal bargaining chips. In the payphone industry, the PSPs hands are substantially tied since TOCSIA[2] prohibits blocking access code (including 800 access) calls. If the PSPs had the power to block the use of dial-around/access code calls when negotiations did not prove fruitful, then the inter-exchange carriers ("IXCs") would be required to sit down and negotiate in earnest. Absent this power, the PSPs will never be in a position to negotiate fair compensation with the IXCs.

The Report and Order, in essence, is set up for a great fall. Despite wanting to follow the free-market theory, there appears to be a recognition that future regulation and rate setting will probably be necessary. For instance, the Report and Order notes that regulatory activity will still need to exist in situations where a PSP may have an exclusive contract or where the number of phones are limited and a PSP, taking advantage of those market conditions, charges "an inflated rate..." Report and Order, ¶59. Furthermore, the Commission is still willing to step in, regulate and set rates in "states that are able to demonstrate to the Commission that there are market failures within the state that would not allow market based rates." Id., ¶61. Ultimately, this will

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[2]Telephone Operator Consumer Services Improvement Act, Pub. L. No. 101-435, 104 Stat., 986 (1990) (codified at 47 U.S.C. §226).

lead to (alleged) market rates at certain payphone locations and regulated rates at others, leaving a path of inconsistency along the way. The Commission's conclusions are clearly erroneous.

The Congressional mandate under §276 (b)(1)(A) was for the Commission to ensure fair compensation by setting a "per-call compensation plan..." Essentially, the Commission passed the buck and, by its conclusions in the Report and Order, is attempting to fit a square peg (free market place theories) in a round hole (the heavily regulated payphone industry). The net result will be to create a ton of work in the future - a boon to the litigators - rather than set forth a concrete plan with limited future modifications.

Under the above analysis, the changes which need to be made to the Report and Order are extensive. Since the faulty premise of the Commission was to rely on a free-market theory, numerous changes must be made throughout the Report and Order to follow the Congressional mandate to establish set compensation levels which are fair, just and reasonable.

B. The Compensation Level Set By The Commission Inhibits, Rather Than Promotes, Competition And Widespread Deployment In The Payphone Industry.

Although the Commission stated that the market place conditions will ultimately set the compensation level, it determined that an initial per-call level needed to be set during the first two phases/years of its plan. Despite rejecting the use of current local coin rates as the proper level of per-call compensation, it ultimately did this by determining that fair compensation would be set at $.35 per call. The WPTA respectfully states that this level of compensation for dial-aroundcalls is grossly inadequate and is not consistent with the fair compensation requirements under the Act or the history surrounding dial-around calls.

The comments filed by the various parties prior to the Report and Order being issued provided the Commission with three main theories of setting per-call compensation. First, parties

such as One Call[3] and Conquest[4] contended that the Commission should use the local coin rate as the surrogate for a fair compensation level. Sprint[5], MCI[6] and AT & T[7] suggested that the Commission limit the amount of per-call compensation to PSP costs. The last most common suggested rate compensation model was provided by parties such as the APCC[8], the Payphone Coalition ("RBOC")[9] and GTE[10], all of whom primarily advocate market-based factors in setting the per-call compensation amount.

In the end, the Commission ultimately set the per-call compensation rate based upon an amount equal to the most widely used local coin rate ($.35). The WPTA believes this to be erroneous and was done despite contrary comments of the Commission[11] and the realities of the current and future payphone industry regulatory atmosphere. Use of the most wide spread local coin rate of $.35 as the surrogate for per-call compensation (which was the net effect of the Commission's action) does not constitute fair compensation for the PSPs in light of the overall value of the calls to the IXCs, all of the costs of the PSPs to do business and the existing and

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[3]One Call Comments at 8.

[4]Conquest Comments at 11.

[5]Sprint Comments at 18-23.

[6]MCI Comments at 13.

[7]AT & T Comments at 6-8.

[8]APCC Comments at 31-34.

[9]RBOC Comments at 8-11.

[10]GTE Comments at 9.

[11]Report and Order at ¶68. The Commission specifically stated that use of current "local coin rates in some jurisdictions may not cover the marginal [incremental] cost of the service." Id.

future regulatory environment. Furthermore, the use of the $.35 per-call rate in the first two phases under the Report and Order is a level which only addresses marginal costs of the PSPs and does nothing to pay for fixed costs or anticipated profit.

In addition, the $.35 per-call compensation amount does not promote deployment of payphones as mandated by Congress, since entrepreneurs make decisions to enter and exit the market place based on the amount of revenue and profit (above all costs) to be generated. Therefore, a higher rate, coupled with the elimination of industry subsidies and access charges, will promote competition and wide spread deployment. Conversely, a lower per-call rate (even coupled with the elimination of the subsidies) will have the effect of inhibiting competition and wide spread deployment of payphones. No reasonable business person will enter any market, let alone the payphone market, if he or she will only be recouping costs; and existing PSPs will be substantially less likely to deploy additional payphones if they will only recoup the incremental costs of adding locations.

Further evidence of the erroneous conclusions of the Commission is reflected in its failure to even set the compensation level in an amount consistent with previous Commission decisions which stated that a "reasonable approach" was to set compensation levels based upon "AT & T's 0+ commissions." Second Report and Order, Policies and Rules Concerning Operator Services and Pay Telephone Compensation, 7 FCC Rcd 3251, 3257 (1995). Back in 1992, the Commission determined that the then average AT & T 0+ commission was about $.40 (which, again, would be a reasonable compensation level for access code calls). See, Id. However, even the $.40 per-call level is out of date since the information upon which that was based is over four

years old. Rather, the actual average commission level now is closer to $.90 per call.[12] Therefore, the $.35 level of per-call compensation set by the Commission is dreadfully and unacceptably low in today's market place.

In short, the Commission erred by defining "fair compensation" based upon willing sellers and willing buyers[13], and disregarding the manner in which willing sellers (PSPs) and willing buyers (such as AT &T) are currently operating in the market place under similar circumstances (i.e., determining commission rates for zero plus calls).[14] Disregarding the manner in which parties are operating in the market place currently is clearly error on behalf of the Commission. In essence, the Commission states that it wants to let the market place set the rates of compensation, but when the market does set rates (in the case of current 0+ calls), the Commission changes its tune to conclude that current market-based surrogates "tend to overcompensate PSPs..." Id.

Congress mandated the Commission to establish a per-call compensation plan to provide fair compensation for the PSPs. In order to properly follow the directions from Congress, the Commission must establish an actual rate per call to provide that fair compensation. Although the WPTA does not dispute the Commission's initial definition of fair compensation as set forth in ¶52 of the Report and Order, it objects to the manner in which the Commission then totally disregards its own definition to set a per-call rate of compensation. In essence, the Commission

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[12]See RBOC Comments at 10 and attached Arthur Anderson LLP report.

[13]Report and Order at ¶52.

[14]Id. at ¶69.

ends up with a definition of fair compensation which is more akin to a price agreeable to an arm twisting IXC (buyer) and a no leverage seller (PSP).

WPTA believes that the existing market-based surrogates more closely provide the required fair compensation mandated by Congress and should, at a minimum, be used to set the rate. Further, the Commission should have identified the upper hand possessed by the IXCs (provided by the TOCSIA blocking prohibition) to set a rate that "ensures" fair compensation without the need to resort to future patchwork rate setting hearings.

Alternatively, the Commission should have taken into consideration the history of dial-around calls. It should be remembered that dial-around calls have not been around forever. The reason for dial-around calls coming into existence was for the sole purpose of obtaining (taking) traffic from the independent payphone providers. In essence, the blossoming of dial-around calls resulted in drastic reductions in the independent payphone provider's income. In that regard, the dial-around calls should be viewed as taking away the independent payphone providers' revenue without "permission" or negotiation to pay for the use of the service. In short, the IXCs are profiting at the expense and cost of the independent payphone providers.

When viewed in light of the above, the Commission's use of cost-based surrogates or market-based surrogates become irrelevant. Rather, dial-around calls should be viewed as a "taking" under the framework of Article V of the Amendments to the Constitution of the United States and "just compensation" paid accordingly.[15] Based on this approach, the proper compensation level would, at a minimum, allow the PSPs to recover all direct and indirect costs

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[15]In pertinent part, Article V states that "nor shall private property be taken for public use, without just compensation." In light of the historical epidemic of dial-around calls and the blocking prohibitions under TOCSIA, the independent payphone provider service has been "taken for public use" and the IXCs allowed to profit.

and, at a minimum, split the balance (or profit) with the IXC. This would provide a per-call compensation rate closer to $1.50 per call, well in excess of the rate ultimately set by the Commission and the rate determined to be fair in the Arthur Anderson report supplied with the RBOC comments.

In short, the WPTA states that the Report and Order must be modified and either a $1.50 or $.90 per-call rate be ordered in place of the $.35 rate. As to the future, either the rate would be indexed with inflation as suggested by the APCC[16] or left subject to modification based upon changes in the market place the Commission deems relevant, but only upon Petition. Setting the compensation level at either $1.50 or $.90 per-call rate makes additional sense since it eliminates the multiple phases set forth in the Commission's Report and Order and the need for the Commission to make targeted/patchwork modifications as suggested in the Report and Order at ¶61.

C. The Commission Failed To Follow The Congressional Mandate Under The Act By Setting Flat-Rate Compensation In The First Year When The Ability To Either Track Or Contract Tracking Is Currently Available To The IXCS.

The WPTA strongly believes that the Commission erred when it determined that the industry, as a whole, lacked technical capabilities to immediately deploy tracking on a per-call basis. The Commission's ultimate decision was contrary to the tentative conclusion it reached in the Notice of Proposed Rule Making, ¶30, wherein the Commission stated that there were either existing or readily available tracking mechanisms and surrogates to allow for the per-call compensation plan required by the Act.

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[16]APCC Reply Comments at 34.

Despite the fact that the technology for tracking exists and many Bell operating companies ("BOCs") and carriers currently have it in place, the Commission decided that it would establish a flat-based compensation plan for a one year period of time in order for those carriers at the bottom rung to either develop a tracking system or contract out for those services.[17] This was done by the Commission, despite the fact that the vast majority of the dial-around compensation will be paid by carriers who already have tracking capabilities. It would seem that the proper course of action to take by the Commission would be to require those who have developed tracking systems or who are capable of immediately contracting out for those services do so immediately, while those who are not (objectively) capable of tracking be required to develop a system within twelve (12) months of the effective date of the regulations and be required to pay a flat rate compensation during the first year.

If the Commission were to fashion order in line with the above, it would be consistent with the mandate of the Act which requires establishing a "plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call..." §276 (b)(1)(A). The across the board flat-rate method established by the Commission in the Report and Order does not fairly compensate all payphone service providers inasmuch as it acts as a subsidy for lower volume payphone operations and locations. In a per-call compensation plan, it is obvious that the higher volume locations will be paid more than the average and the lower volume locations will be paid less. Since many of the WPTA membership believe that most of their locations have higher than average traffic, they are, in essence, subsidizing smaller less

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[17]Despite statements by some carriers to the contrary, call tracking is accruing (today) in Illinois for subscriber 800 and access code calls. The BOCs are also capable of call tracking and could certainly perform the function in same arrangement with the carriers.

efficient operations. In essence, the Commission's flat-rate per month order unfairly under compensates many telephones and unfairly overcompensates others. Although using a monthly flat-rate per phone based on average calling volumes may be a necessity for carriers that are too small to track calls, this is no reason for the Commission to order it across the board for all carriers.

In short, the Commission should order those carriers already identified who are able to track calls to do so immediately and for the smaller carriers to pay a per-phone monthly flat-rate (with either the $1.50 or $.90 per-call compensation level argued in the preceding section) based upon their individual percentage of toll revenue or their percentage of overall 800 service traffic. The WPTA would concur with the APCC in that the carriers who would pay the flat-rate compensation should be assessed an additional "25% incentive charge" in order to ensure that they take all reasonable efforts to obtain per-call tracking capabilities as soon as possible. See APCC reply comments at 21.

D. The Commission Should Order Compensation To Be Paid On A Monthly Basis.

In the Report and Order, the Commission acknowledged that a number of independent payphone providers requested an order from the Commission requiring carriers to pay compensation on a monthly basis. The Commission declined to grant these requests in order form and, rather, stated that it would "leave the details associated with the administration of this compensation mechanism to the parties to determine for themselves through mutual agreement." Report and Order, ¶115.

WPTA strongly believes that the Commission erroneously failed to set a monthly pay requirement and, in addition, erroneously failed to provide a penalty should the IXC or agent fail

to make payment within the allotted time frame. In many instances, IXCs have delayed payment by as many as seven or more months since it had no fear of reprisal or penalty. Without fear of penalty, there is no reason for the IXCs to negotiate for a more reasonable time frame for payment to be made. Therefore, it is incumbent upon the Commission to set forth in its order a reasonable time frame for payment and a penalty for failure to make timely payment. The WPTA believes thirty days is reasonable.

III. END-USER COMMON LINE CHARGES

Again, in clear language, Congress, in passing §276 (b)(1)(B) of the Telecommunications Act of 1996, has ordered the Commission to set forth regulations that :

> discontinue the intrastate and the interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

It appears that the idea behind this piece of legislation was to discontinue the carrier access charges relative to payphone service, such as the end-user common line ("EUCL") charges. To this end, the WPTA adopts the views and rationale set forth in the comments of the Georgia Public Communications Association ("GPCA") in support of applying the EUCL exemption to all payphone lines, independent and LEC nonregulated.[18]

In its Report and Order, the Commission decided that the EUCL charges (characterized as a subscriber line charge) would not be discontinued as required by the Act but, rather, would no longer be discriminatorily applied to independent payphones. See Report and Order at ¶187. The WPTA objects to this determination and believes it to be not consistent with the mandates of the Act.

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[18]GPCA Comments at 18-19.

While the Commission's decision does tend to support the anti-discriminatory language set forth in the Act, it is contrary to the requirements of the Act that such charges be discontinued. For the reasons set forth by the GPCA as referenced above, the WPTA believes that the order should be modified such that the LECs be prohibited from applying EUCL/SLC charges to the independent payphone provider's lines.

IV. CONCLUSION

The WPTA respectfully requests the Commission to modify its Report and Order in accordance with the foregoing comments and requests.

Dated this 18th day of October, 1996.

Respectfully submitted,

By: _____

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